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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TANDY CORPORATION,
Intervenor/Appellant,

v.

UNITED STATES OF AMERICA,

and

WESTERN ELECTRIC COMPANY, INC., AND
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Appellees.

On Appeal From The United States District Court For The District Of Columbia

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Was the elimination of defendant AT&T's outstanding compulsory patent licensing obligations approved by the District Court without sufficient basis in the record and contrary to the public interest?

2. Was the failure to require that the consent decree proposed by the Department of Justice and defendant AT&T be modified to provide for divestiture of the Bell retail outlets (Phone Center Stores) to the local telephone operating companies contrary to the public interest?

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JURISDICTIONAL STATEMENT

Intervenor/appellant Tandy Corporation[1] appeals from a final judgment of the United States District Court for the District of Columbia approving a consent decree pro-

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[1] Hereinafter referred to as "Tandy." A listing of all parent companies, subsidiaries and affiliates of Tandy, as required by Rule 28.1, appears on the first page of the Application of Tandy Corporation for an Extension of Time in which to Docket Appeal from the United States District Court for the District of Columbia, filed with this Court on November 17, 1982.

posed by the United States Department of Justice and defendants American Telephone and Telegraph Company (AT&T) et al.[2] Tandy argued in the District Court that the "public interest" standard of the Antitrust Procedures and Penalties Act required modification of the proposed consent decree (1) to retain AT&T's compulsory patent licensing obligations under the 1956 *Western Electric* consent decree and (2) to include divestiture of AT&T's Phone Center Store assets to the telephone operating companies.

OPINIONS BELOW

The opinion of the District Court, issued on August 11, 1982, is reported at 34 Fed.R.Serv.2d 991 (D.D.C.) and is reproduced in the Joint Appendix (hereinafter cited as J.A.),[3] pp. 1-172. The District Court's order modifying the Final Judgment originally entered on January 24, 1956,[4] was filed on August 24, 1982, is reported at 1982-2 Trade Cas. ¶ 64,900 (D.D.C.) and is reproduced in the Joint Appendix, pp. 173-90.[5] The District Court's dis-

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[2] In addition to the parties listed in the caption of the case in this Court, the District Court granted intervenor status to numerous parties, which are listed in the District Court's Order of August 26, 1982, reproduced in the Joint Appendix hereto, at pp. 191-94.

[3] Tandy Corporation has joined with several states and state public utility commissions in submitting a Joint Appendix, which is separately bound and is incorporated by reference herein.

[4] The Final Judgment of the District Court for the District of New Jersey, entered on January 24, 1956, is reported at 1956 Trade Cas. ¶ 68,246 and is reproduced in the Appendix hereto, pp. 2a-19a.

[5] The District Court's order entered on August 23, 1982, denying the government's request for reconsideration of the portion of its opinion of August 11, 1982, relating to customer premises equipment marketing is reported at 1982-2 Trade Cas. ¶ 64,980 (D.D.C.) and is reproduced in the Joint Appendix hereto, pp. 195-200.

missal order entered August 24, 1982, is reported at 1982-2 Trade Cas. ¶ 64,981 (D.D.C.).

The District Court's order granting intervenor status, entered on August 26, 1982, is not reported but is reproduced in the Joint Appendix, pp. 191-94. The District Court's order entered on November 10, 1982, certifying this case for direct appeal pursuant to the Expediting Act is not reported but is reproduced in the Joint Appendix, pp. 204-08.[6]

JURISDICTION

This appeal is taken from a final judgment entered in the United States District Court for the District of Columbia approving a consent decree that modifies the 1956 Final Judgment in the *Western Electric* case and settles an action brought by the Government in 1974 in the District Court for the District of Columbia under Section 2 of the Sherman Act, 15 U.S.C. § 2. The District Court's opinion was issued on August 11, 1982. (J.A. at 1). The Order modifying the 1956 Final Judgment in the *Western Electric* case was filed on August 24, 1982. (J.A. at 173). Tandy Corporation was granted Intervenor status by the District Court's Order of August 26, 1982, (J.A. at 191) and filed a timely Notice of Appeal in the United States District Court for the District of Columbia on November 3, 1982. (J.A. at 227). On November 10, 1982, the District Court entered an Order certifying a direct appeal to this Court pursuant to the Expediting Act, 15 U.S.C. § 29(b). (J.A. at 204). Federal jurisdiction is based upon 28 U.S.C. § 1337, and the jurisdiction of this Court is invoked under 15 U.S.C. § 29(b).

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[6] In addition, the District Court's denial of defendants' motion to dismiss on September 11, 1981, is reported at 524 F.Supp. 1336 (D.D.C. 1981).

STATUTES INVOLVED

The Expediting Act, 15 U.S.C. § 29, as amended, provides in pertinent part:

> (b) Direct appeals to Supreme Court
>
> An appeal from a final judgment pursuant to subsection (a) of this section shall lie directly to the Supreme Court, if, upon application of a party filed within fifteen days of the filing of a notice of appeal, the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice. Such order shall be filed within thirty days after the filing of a notice of appeal. When such an order is filed, the appeal and any cross appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. The Supreme Court shall thereupon either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal and any cross appeal therein had been docketed in the court of appeals in the first instance pursuant to subsection (a) of this section.

The Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), (the Tunney Act) provides in pertinent part:

> (e) Public interest determination
>
> Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—
>
> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief

sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

(f) Procedure for public interest determination

In making its determination under subsection (e) of this section, the court may—

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

(4) review any comments including any objections filed with the United States under subsection (d) of this section concerning the proposed judgment and the responses of the United States to such comments and objections; and

(5) take such other action in the public interest as the court may deem appropriate.

Section 2 of the Sherman Act, 15 U.S.C. § 2, as amended, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

On January 24, 1956, the District Court for the District of New Jersey approved a proposed consent decree between AT&T and the Department of Justice, putting an end to a case that had begun in 1949 with the filing of a complaint by the Government against AT&T and its subsidiary the Western Electric Company, Inc. *United States* v. *Western Electric Co.*, Civil Action No. 17-49 (the *Western Electric* case).[7] That complaint alleged that the defendants had monopolized and conspired to restrain trade in the manufacture, distribution, sale and installation of telephones, telephone apparatus, equipment, materials and supplies, in violation of Sections 1, 2 and 3 of the Sherman Act. 15 U.S.C. §§ 1, 2 and 3. Among the provisions of the 1956 consent decree were a prohibition on AT&T's engaging in any business other than the provision of common carrier communications services, and a requirement that the defendants license their patents to all applicants upon the payment of appropriate royalties, or in some cases royalty-free. *United States* v. *Western Electric Co.*, 1956 Trade Cas. ¶ 68,246 (D.N.J.).

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[7] The *Western Electric* case was subsequently transferred to the District Court for the District of Columbia and assigned a new docket number (C.A. No. 82-0192).

On November 20, 1974, the Department of Justice filed another antitrust suit against AT&T, Western Electric and Bell Telephone Laboratories, Inc., alleging monopolization of telecommunications services and equipment in violation of Section 2 of the Sherman Act. *United States* v. *American Telephone and Telegraph Co. et al.*, Civil Action No. 74-1698 (D.D.C.) (the *AT&T* case.) Trial began in January, 1981. Following conclusion of the Government's case, the Court denied defendants' motion to dismiss the action. *United States* v. *American Telephone and Telegraph Co.*, 524 F.Supp. 1336 (D.D.C. 1981). On January 8, 1982, with the defendants having presented virtually their entire case, the parties advised the Court they had reached an agreement on a proposed decree.

Rather than "settling" the *AT&T* case, which they had been litigating since 1974, the parties sought a dismissal of that case and simultaneously filed a "Modification of Final Judgment" with the District Court for the District of New Jersey, which was to replace the *Western Electric* decree with an entirely new decree. On January 11, 1982, the District Court for the District of New Jersey approved the proposed Modification. Subsequently, on motion of the parties, the New Jersey Court transferred the *Western Electric* action to the Court hearing the *AT&T* case, and the latter vacated the January 11 Order approving the proposed Modification. By agreement of the parties, the District Court ordered that procedures equivalent to those required by the Tunney Act, 15 U.S.C. § 16(b)-(h), be applied to the proposed settlement.[8]

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[8] The parties initially took the position that the Tunney Act did not apply to modifications of existing decrees.

The proposed settlement required the divestiture of the twenty-two Bell Operating Companies (BOC's) from AT&T and limited the BOC's to providing local telephone exchange service. The divested BOC's were not permitted under that proposal to manufacture or market telecommunications products or customer premises equipment (CPE), or to provide interexchange services, directory advertising such as the Yellow Pages, information services, or any other product or service which is not a "natural monopoly service actually regulated by tariff." The proposed Modification also eliminated the mandatory patent licensing provisions imposed on AT&T by the 1956 decree.

In furtherance of its review of the proposed decree, the Court solicited comments from interested persons. Over 600 comments were received. In its Comments, Tandy urged, *inter alia*, that (1) the BOC's should be permitted to sell, but not manufacture, CPE; (2) the AT&T retail outlets (the Bell Phone Center Stores) should be among the assets to be divested by AT&T and thereafter controlled by the BOC's; and (3) the compulsory patent licensing provisions of the 1956 decree should be retained. *Comments of Tandy Corporation* (filed April 20, 1982).

Following review of the comments submitted by Tandy and other interested parties, and responses from AT&T and the Department of Justice, the Court on May 25, 1982, specified a number of issues for further briefing. Among the issues it raised were the absence of restrictions on AT&T, the restrictions proposed for the divested BOC's, and the appropriate division of assets between AT&T and the divested BOC's. Tandy filed briefs addressing most of the issues it had discussed in its Comments, once again urging, *inter alia*, that the BOC's be

permitted to sell, but not manufacture, CPE[9] and that the compulsory patent licensing provisions of the 1956 decree be retained.[10]

On June 17, 1982, the Court scheduled oral argument on the issues specified in the Court's May 25 Order. Counsel for Tandy was designated one of the lead counsel on the issue regarding "Restrictions on Bell Operating Companies." At that hearing, held June 29, 1982, Counsel for Tandy reiterated the arguments regarding the CPE issue Tandy had previously raised in its filings. (Oral Argument Transcript at 25169-25178).

In its August 11, 1982, opinion the Court determined that the proposed decree would satisfy the Tunney Act's public interest standard if AT&T and the Justice Department would agree to several specified changes. One of the changes the Court required would permit the divested BOC's to provide, but not manufacture, CPE. (slip op. at 176, J.A. at 170). Despite its insistence on this change, the Court rejected the suggestion that the AT&T Phone Center Stores be divested to the BOC's. (slip op. at 111 n. 248, J.A. at 108). With respect to patent licensing, the Court concluded that the elimination of the 1956 decree's patent licensing provisions was "not inconsistent with the public interest." (slip op. at 82, J.A. at 79). Finally, the Court indicated that it would grant intervenor status to those who previously had filed requests or motions to intervene. (slip op. at 164, J.A. at 159).

On August 19, 1982, the Court denied the Government's request that it reconsider its position regarding

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[9] Brief of Tandy Corporation Concerning Restrictions and Demands on the Bell Operating Companies (filed June 14, 1982).

[10] Brief of Tandy Corporation Regarding Absence of Restrictions on AT&T (filed June 14, 1982).

the BOCs' participation in the CPE market. (J.A. at 195). The parties then submitted a proposed decree incorporating the Court's required changes and on August 24, 1982, the Court entered the amended Modification of Final Judgment, vacated the provisions of the 1956 consent decree and ordered the *AT&T* case dismissed. (J.A. at 173). On August 26, 1982, it granted intervenor status to numerous parties, including Tandy Corporation.[11] Several intervenors, including Tandy, filed timely Notices of Appeal in the U.S. District Court for the District of Columbia. On November 10, 1982, in response to motions filed by the United States and three intervenors pursuant to the Expediting Act, 15 U.S.C. § 29(b), the District Court certified that the "immediate consideration of the appeals taken herein by the Supreme Court is of general public importance in the administration of justice." (J.A. at 207). On November 19, 1982, Chief Justice Burger granted an extension of time until December 8, 1982, for the filing of Tandy's Jurisdictional Statement.

THE QUESTIONS ARE SUBSTANTIAL

The matter before the Court concerns the settlement of one of the largest federal antitrust cases in history, against the world's largest corporation, AT&T. This appeal raises serious issues about an important and frequently used tool of antitrust enforcement—the consent decree—and the role of the federal judiciary in ensuring that such decrees are in the public interest. The specific consent decree at issue here has enormous implications for Tandy as a competitor of Western Electric in the sale of CPE, for other competitors of AT&T,

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[11] Intervenors were granted limited rights, including the right to appeal from the Court's approval of the proposed settlement. *See* J.A. at 193-94.

and for all who use and rely upon telecommunications services, facilities and equipment. The consent decree will have a dramatic impact on the American telecommunications and electronics industries and will, in turn, likely affect a variety of consumer welfare, national defense and foreign trade interests. Tandy could not agree more with the District Court's statement that "[t]his is not an ordinary antitrust case." (slip op. at 32, J.A. at 33).

Under the 1974 amendments to the Expediting Act, this Court may itself conduct a plenary review of an appeal from a District Court decision, or it may remand to the Court of Appeals for such review. Plenary consideration by either the Supreme Court or the Court of Appeals is particularly appropriate and necessary since this Court has repeatedly emphasized its commitment to thorough review of the effectiveness of antitrust decrees on direct appeals pursuant to the Expediting Act. "The relief granted by a trial court in an antitrust case and brought [to the Supreme Court] on direct appeal, thus by-passing the usual appellate review, has always had the most careful scrutiny of this Court." *United States* v. *E.I. duPont de Nemours and Co.*, 366 U.S. 316, 323 (1961), quoting *International Boxing Club of New York, Inc.* v. *United States*, 358 U.S. 242, 253 (1959).

In exercising its direct review function, this Court has not treated a District Court's power to enter an antitrust decree "as one of discretion, subject only to reversal for gross abuse," but rather has "recognized 'an obligation to intervene in this most significant phase of the case' when necessary to assure that the relief will be effective." *United States* v. *Glaxo Group Limited*, 410 U.S. 52, 64 (1973), quoting *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 89 (1950); *United States* v. *E.I. duPont de Nemours and Co.*, *supra*, 366 U.S. at 323.

In *United States* v. *E.I. duPont de Nemours and Co.*, *supra*, this Court articulated the reasons why direct appeal under the Expediting Act necessitates such an unusually broad review by the Court.

> Our practice reflects the situation created by the congressional authorization, under § 2 of the Expediting Act, of a direct appeal to this Court from the judgment of relief fashioned by a single judge. Congress has deliberately taken away the shield of intermediate appellate review by a Court of Appeals, and left with us alone the responsibility of affording the parties a review of his determination. This circumstance imposes a special burden upon us, for . . . "it is unthinkable that Congress has entrusted the enforcement of a statute of such far-reaching importance to the judgment of a single judge, without review of the relief granted or denied by him."

366 U.S. at 324-25, quoting *Hartford-Empire Co.* v. *United States*, 324 U.S. 570, 571 (1945) (footnotes omitted). Thus, this Court has an independent obligation to satisfy itself that a decree approved by a District Court in a Government antitrust suit effectively redresses the violations alleged in the complaint. *United States* v. *Glaxo Group Limited*, *supra*, 410 U.S. at 64. The broad standard of review employed by this Court on direct appeal is applicable to review of the consent decree in this case since, as the District Court stated in its August 11, 1982, opinion, the "decisions granting relief after a finding of liability form the most relevant yardstick for determining whether the proposed consent decree will further antitrust policies." (slip op. at 29; J.A. at 29-30).

Therefore, this Court should either give plenary consideration to the issues presented herein or remand to the Court of Appeals for full consideration of whether the terms of the consent decree are in the public interest under the Tunney Act. 15 U.S.C. § 16(e). To do otherwise

would effectively preclude thorough evaluation of the competitive effects of one of the most far-reaching and significant consent decrees in antitrust history—the type of plenary review clearly intended by Congress.

Patent Licensing

As part of the settlement in this case, the District Court approved elimination of certain compulsory patent licensing obligations that had been imposed upon AT&T in the 1956 *Western Electric* consent decree. Indeed, since patent licensing and patent abuse were not themselves issues in the *AT&T* case, that case was tried before the District Court on the apparent assumption that the licensing provisions of the 1956 decree would remain in place. As a result, neither party had occasion to submit evidence on those issues or to argue their merits below.

Elimination of AT&T's compulsory patent licensing obligations would have a profound impact upon competition in the manufacture and marketing of a wide range of telecommunications equipment, particularly customer premises telephone equipment. In addition, the elimination of the compulsory patent licensing provisions may seriously injure a wide variety of competitors and potential competitors of AT&T. Both the language of the Tunney Act and the fact that the proposed decree would modify the terms of an outstanding consent decree required that the District Court determine, before approving the proposed settlement, that termination of AT&T's licensing obligations was in the public interest. 15 U.S.C. § 16(e); *see* slip op. at p. 25 n. 67, J.A. at 25-26. On that crucial issue, the Government and AT&T obviously shared the burden of proof since they were the only parties to the suit.

The District Court did not have before it information sufficient to justify its determination that this modifica-

tion was consistent with the public interest. Both AT&T and the Government made a number of arguments in support of the modification, but those arguments were based entirely on theory and speculation. The Court did not assess and on the record before it could not have assessed adequately (1) the number, nature and competitive importance of existing AT&T patents and of additional patents likely to result from ongoing AT&T research; (2) the extent to which certain kinds of patents are necessary for participation by competitors in the manufacture of specific products or provision of specific services and the ability of actual and potential competitors of AT&T to obtain that technology; (3) the extent to which access to AT&T patents will continue to remain available under existing licenses and cross-licenses; (4) the impact of the 1956 decree provisions on research and development, on barriers to entry, on present competitors, and on competition in the markets for specific products and services; (5) the cost (both past and future) of compliance by AT&T with these provisions; (6) AT&T's intentions with respect to future research and development activities and to future patent licensing in this industry; and (7) the benefits to the public resulting from compulsory licensing.

In order for the District Court meaningfully to have evaluated whether elimination of the compulsory patent licensing requirements was in the public interest, it should have insisted upon thorough development of these complex and important issues in the record. Yet neither AT&T nor the Government sought to provide a detailed evidentiary basis for their joint request to relieve AT&T of its compulsory licensing obligations under the 1956 decree.

The District Court gave a number of reasons for its conclusion that the elimination of these obligations was

"not inconsistent" with the public interest, all of which were either simplified factual conclusions or speculative assumptions concerning the ways in which AT&T, its competitors and the BOC's would likely react to certain incentives which the settlement might alter. Whether these reasons were correct or incorrect cannot be determined, since a sufficient evidentiary basis for assessing such conclusions is not in the record. The Court thus lacked the necessary record on which to base the conclusions that it purported to make. This fundamental flaw in the District Court's treatment of the critically important licensing provisions of the 1956 *Western Electric* decree by itself justifies this Court's reversal.

Continuation of AT&T's compulsory patent licensing obligations is necessary for introduction of effective competition into the manufacture and marketing of CPE. Consequently, it is essential that the District Court's decision to vacate the relevant portion of the 1956 consent decree be closely scrutinized on appeal, either by the Supreme Court or by the Court of Appeals on remand under the Expediting Act. Alternatively, this Court should determine that the District Court lacked a proper basis for its conclusion and thus order that this aspect of the proposed settlement be vacated and remanded to the District Court for appropriate evidentiary hearings and further consideration.

Phone Center Stores

The settlement proposed by AT&T and the Justice Department included a provision barring the divested operating companies from marketing CPE. The District Court determined that this provision was not in the public interest because it was "directly anticompetitive" and because the evil which it was designed to prevent—use of regulated monopoly revenues to subsidize the sale of CPE—seemed unlikely to occur. The District Court

stated that permitting the BOC's to market CPE would instead contribute substantially to creation of a more competitive market, because the BOC's were the entities most likely to be able to provide "an effective counterbalance to AT&T's market strength and thereby to promote a genuinely competitive market." (slip op. at 112, J.A. at 109).

Although the District Court required the parties to revise their proposed settlement to permit the marketing of CPE by the BOC's, the Court failed to order one additional step which is crucial to the creation of a competitive CPE market. Under the decree approved by the District Court, AT&T will retain its Phone Center Stores, which comprise an established, effective nationwide retail distribution system for CPE. Thus the BOC's, while permitted to market CPE, must establish their own retail distribution facilities, in effect entering the retail market from scratch.

It is clear that the District Court seriously erred in permitting AT&T to retain the Phone Center Store assets. The Court found that:

> The Bell System is a vast, vertically integrated company which dominates local telecommunications, intercity telecommunications, telecommunications research, and the production and marketing of equipment. (slip op. at 101, J.A. at 98).

This finding of AT&T dominance of the CPE industry, coupled with the Court's concern that the BOC's contribute to a competitive CPE market, cannot be reconciled with the inadequate remedial measures approved by the District Court. The District Court, like the Justice Department, is apparently willing to allow AT&T's anticompetitive dominance of the CPE market to be slowly eroded over many years. In rejecting the request for

divestiture of the Phone Center Stores to the BOC's, the Court pointed only to the BOCs' "substantial retail access through their contact with the individual telephone subscribers" (slip op. at 111 n. 248, J.A. at 108) as a basis for its apparent assumption that BOC entry into CPE marketing would assure elimination or meaningful reduction of AT&T's market position.

Divestiture of the Phone Center Stores to the BOC's is essential if the decree is to have any realistic chance of providing "an effective counterbalance to AT&T's market strength." The Phone Center Stores have generated substantial customer goodwill and thus confer an overwhelming advantage upon AT&T in competing with any other CPE retailers or would-be entrants into that market. In permitting AT&T to succeed to the locations, the goodwill and the customer base of the existing Phone Center Stores, the District Court's decree places the BOC's at a substantial competitive disadvantage and may significantly delay or even deter BOC entry into that market.

The District Court correctly found that the BOC's were the entities most likely to be able to provide effective competition with AT&T. (slip op. at 112, J.A. at 109). But the BOC's have been unnecessarily handicapped by the District Court in that effort. Inclusion of a requirement in the decree that AT&T divest its Phone Center Store assets to the BOC's would eliminate that unnecessary obstacle. AT&T's massive resources, its enormous R&D capability, and its reputation for manufacturing high quality telephone equipment would permit it to re-enter CPE marketing and re-establish itself quickly as a significant, effective competitor. At the same time, the BOC's would continue AT&T's former marketing operations, and the competitive "counterbalance" sought by the District Court would be more quickly and more effectively

established. The Tunney Act's public interest standard requires further modification of the decree in this manner. It is patently contrary to the public interest to prolong unnecessarily the anticompetitive structure of the CPE market when divestiture, a traditional and widely used antitrust remedy, can readily correct the problem.

The District Court declined to modify the proposed consent decree to require divestiture of the AT&T Phone Center Stores, stating that their retention by AT&T was not anticompetitive. (slip op. at 111 n.128, J.A. at 108). In addition to reaching a conclusion that is questionable in itself, the District Court used the wrong standard in reaching that conclusion. The appropriate standard was not whether the proposed decree was anticompetitive, but whether the public interest required the more effective, procompetitive divestiture of AT&T's retail outlets in order to bring meaningful competition to CPE marketing.

Because this case comes to the Supreme Court under the Expediting Act, the Court has both the power and the responsibility to assess the effectiveness of the consent decree in creating a genuinely competitive CPE market. Where the proposed remedy is found to be inadequate, the Court should require appropriate changes in the decree, so that the resulting remedy satisfies the public interest standard of the Tunney Act. Tandy respectfully urges the Supreme Court to order such changes, to remand with directions requiring such changes, or alternatively to remand to the Court of Appeals for plenary consideration of these issues in that forum.

CONCLUSION

Tandy Corporation seeks further modification of the Modified Final Judgment to provide for (1) reinstatement of the compulsory patent licensing provisions and (2) divestiture of the Phone Center Store assets to the Bell Operating Companies. For the reasons stated above, this Court should give plenary consideration to these issues, or alternatively, remand these issues to the Court of Appeals for appropriate review.

Respectfully submitted,

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